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ICON CITY DEVELOPMENT SDN BHD v. LEE KEAN HWA & ORS

FEDERAL COURT, PUTRAJAYA
RHODZARIAH BUJANG FCJ
HANIPAH FARIKULLAH FCJ
B LEE SWEE SENG FCJ
[CIVIL APPEAL NO: 02(i)-3-01-2025(W)]
22 OCTOBER 2025

Abstract – *In interpreting the clauses of a commercial contract, such as a sale and purchase agreement, the court adopts an interpretation that best reflects business common sense. In this case, the dispute concerns whether the calculation of the period for delivering vacant possession begins from (i) the date when both conversion and building plan approvals were first obtained; (ii) the expiry of the 18-month period comprising the initial 12-month approval period and a six-month extension; or (iii) the date of approval of the last amended building plan. The court holds that the calculation begins as stated in (i), as this interpretation best accords with business common sense. Once the approvals are granted, the developer can commence construction, and there is no justification for postponing the start of the delivery period until the expiry of the approval period or the approval of later amendments. To hold otherwise creates a moving and uncertain timeline open to manipulation by the developer, which is commercially absurd.*

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CONTRACT: *Agreement – Sale and purchase agreement – Interpretation – Purchasers entered into sale and purchase agreements with developer for purchases of small office versatile office (SOVO) units – Agreement provided delivery of vacant possession of units should be made within 42 months after date developer obtained conversion and building plans approvals for project – Whether calculation should begin from date approvals first obtained, from expiry of 18 months period which comprised original 12-month approval period and six-month extension or from date of approval of last amended building plan – Interpretation that best reflect business common sense*

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CIVIL PROCEDURE: *Appeal – Appeal to Federal Court – Appeal against decisions of High Court and Court of Appeal which held calculation of period of delivery of vacant possession ought to begin from date conversion and building plans approvals first obtained – Whether correct to apply business common sense interpretation – Whether purchasers' action for liquidated damages against developer could be disposed of by way of summary judgment – Whether questions on contractual interpretation question of law that could be disposed of by way of summary judgment – Whether developer could raise fresh issues that were not included in questions of law that were given leave*

The appellant ('defendant') was the developer of a project ('project') while the respondents ('plaintiffs') were the purchasers of the small office versatile office units (SOVO) ('units') within that project. Each of the plaintiffs had entered into a sale and purchase agreement ('SPA') with the defendant. Clause 35A of the SPA required the defendant to obtain both the conversion and building plan approvals ('approvals') for the project within 12 months from the date of the SPA, with a further six-month extension permitted ('approval period' or 'extended approval period'). Meanwhile, s. 10 of Schedule A of the SPA provided that, 42 calendar months after the defendant had obtained the said approvals, the defendant was required to deliver vacant possession of the units to the plaintiffs ('42-month period'). The defendant completed the delivery of vacant possession of the units on 6 October 2016, which was a date after the lapse of the 42-month period. At the High Court, the plaintiffs commenced an action for liquidated damages ('LD') against the defendant ('action') for the delay in delivering the vacant possession of the units. The plaintiffs also filed an application for summary judgment pursuant to O. 14 of the Rules of Court 2012 ('ROC') ('application'). In allowing the application, the High Court held that, since both approvals were obtained by the defendant on 2 August 2012, which was a date within the approval period, the computation of the 42-month period began on 2 August 2012. The High Court rejected the defendant's suggestion that the computation of the 42-month period should begin either from 17 November 2015, being the date of approval of the last amended building plan, or from the expiry of the 18 months comprising the 12-month approval period and the six-month extended approval period. The High Court found that there was no ambiguity in the relevant clauses of the SPA. Section 10 of Schedule A clearly governed the computation of the 42-month period. As there were no triable issues warranting a full trial, and the action involved only a question of contractual interpretation – which is a matter of law – the High Court held that the action was suitable to be disposed of by way of summary judgment ('High Court's decision'). Dissatisfied, the defendant filed an appeal to the Court of Appeal. The High Court's decision was upheld. The Court of Appeal held that, as the SPA was a commercial contract, the business common sense interpretation applied. The Court of Appeal determined that the 42-month period should commence from the date of the first approval of the building plans, namely 2 August 2012, which enabled construction of the project to begin. The Court of Appeal, among others, emphasised that, by reading cl. 13.1.1 of the SPA together with s. 10 of Schedule A and cl. 35A.1, the SPA clearly stated that the 42-month period would begin from the approval period or the extended approval period, which was defined as commencing from the date the requisite approvals were first obtained – not from any subsequent amendments. The clauses did not allow for alternative or extended interpretations, and time was expressly made 'of the essence' under cl. 38.16. Moreover, by applying the *contra proferentem* rule, any potential ambiguity was resolved against the defendant, being the drafter of the SPA. Further, by

applying the interpretive maxim *generalia specialibus non derogant*, the Court of Appeal held that the specific provisions on the 42-month period prevailed over the general ones ('Court of Appeal's decision'). Hence, the present appeal by the defendant. Before this court, the defendant was granted leave on two questions of law, namely: (i) whether in a sale and purchase contract for commercial property, when the 'time for delivery of vacant possession' was provided to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, the calculation ought to begin from the expiry of the said period of time and not prior to the said expiry; and (ii) whether in a sale and purchase contract for commercial property, when the 'time for delivery of vacant possession' was provided to be calculated from a date of time for approval of building plans and 'building plans' had been defined to include 'any and all such amendments, alterations and modifications thereto', the calculation ought to begin from the date of the first/original approval of the building plan or the relevant date of the last amendment of the building plan subject to the prescribed said period of time. Apart from these, the following issues also arose: (i) whether a question of law arising from undisputed facts may be disposed of by way of a summary judgment application; (ii) whether for some other reason, there ought to be a trial for the action; and (iii) whether the defendant should be allowed to raise a fresh question of law not included in the two questions of law given leave.

Held (dismissing appeal with costs; affirming decisions of Court of Appeal and High Court)
Per Lee Swee Seng FCJ delivering the judgment of the court:

(1) The issue concerning the interpretation of the relevant clauses in the SPA was a pure question of law, which was plainly within the purview of the court to decide when hearing a summary judgment application. Although this issue sometimes required more careful consideration, especially when there were conflicting authorities, it was an exercise that did not require the court to hear witnesses on their understanding of the relevant clauses in question, unless there were issues of estoppel or a subsequent course of conduct by the parties pointing to a variation or waiver of certain terms of the contract. Thus, where the facts necessary to determine a dispute were not in dispute, and everything hinged on the interpretation of the relevant clauses – as in this case, in the SPAs with respect to a claim for LD for late delivery – the action could appropriately be disposed of by way of a summary judgment application. (paras 29-31)

(2a) The 'time for delivery of vacant possession' had been objectively stated under s. 10 of Schedule A to be 42 months from the date of the approval period or the extended approval period. Like all periods of time, it ran from a specific date, which in this case was 'the date of

the period of approval'. Thus, if the date of approval of the building plans was a date after the SPA were signed and within the 12-month period from the date of the SPA, then that date was taken to be the date from which the 42-month period was calculated. The conversion approval was obtained on 17 January 2012, while the building plans were approved on 2 August 2012. The defendant had taken the earliest SPA date to be 19 August 2011, which would have made the expiry of the 12-month approval period 19 August 2012, and the further six-month extension under the extended approval period 19 February 2013. (paras 41 & 42)

(2b) The 42-month period should have run from 2 August 2012, which was 'from the date of the period of approval' and not from the date 'of the expiry' of the period of approval, which was 19 August 2012. The words 'of the expiry' were not present in the provision, and the meaning of the provision would be changed drastically if those words were read into it. The expression 'the date of the period of approval' could only have meant the date that fell within the period of approval. The court had to refrain from reading into s. 10 of Schedule A words that were not there, namely, 'from the date of expiry of the period of approval'. In this case, the 'extended approval period' was not engaged, as the building plan approval had been obtained during 'the period of approval'. (paras 43 & 44)

(2c) Being a commercial agreement, the relevant clauses had to be interpreted in a business common sense manner. It did not comport with business common sense to say that, although the building plan approval had been obtained before the expiry of the approval period, one still had to wait for the expiry of that period when s. 10 of Schedule A did not so provide. There was also no rationale for postponing the date on which time started to run for completion, since construction could already have commenced once the building plans were approved. (para 45)

(2d) There was no ambiguity. Even if there was, it would be resolved in favour of the purchasers, as the SPA had been drafted by the developer and ought to have been interpreted *contra proferentem* against the party that had drafted the standard form clauses. (para 51)

(3a) The defendant's interpretation that the 42-month period began from the date of the last approval of the amended building plans would have meant that the said period could become a moving or roving timeline. Before any amended building plans were submitted for approval, the 42-month period was fixed, but it could then be recommenced later depending on the number of amended building plans that might subsequently be submitted and approved. Such an interpretation

would not comport with business common sense, and it would have run contrary to the provision of cl. 38.16, which made time, wherever mentioned, of the essence of the contract in relation to all provisions of the SPA. Clause 38.16 would be rendered otiose and denuded of any meaning. Moreover, such an interpretation would also provide a fertile ground for abuse, as the defendant, sensing that completion was due, could always submit another amendment – no matter how minor – and once it was approved, could secure a fresh extension of time to deliver vacant possession. (paras 57-59)

(3b) Context was paramount, and this was captured by the qualifying words in cl. 1.1 of the SPA, namely, 'where the context so admits'. It did not necessarily mean that each time the expression 'building plans' appeared, one had to read it as covering 'amended, altered, or modified building plans. The context might not have justified that interpretation. Thus, even though the grammatical meaning of the definition of 'building plans' might have been wide enough to include all and any, including the last approved building plans, the context did not admit such an interpretation for the purpose of determining the time for delivery of vacant possession, which was to run from the date of the first approval of the building plans. (paras 65 & 68)

(3c) Applying the contextual, harmonious, and business common sense approach, the meaning of the date of the approval of 'building plans' could not stretch to the date of the last approval of 'building plans' for the purpose of determining the 42-month period, even though, pedantically and definition-wise, 'building plans' included 'all amendments, alterations, and modifications to the building plans'. Clause 1.1, with the qualifying words 'where the context so admits', constrained the court to consider the context of the definition of 'building plans' before applying it to cl. 13.1.1, s. 10 of Schedule A, and cls. 35A.1 and 38.16. (paras 72 & 73)

(4) The fact that the question of law was of some complexity and, therefore, took a little longer to be understood did not, by itself, bring the application within the exception under O. 14 r. 3 of the ROC, under the rubric of where 'there ought for some other reason to be a trial of that claim', as referred to by the principle in *Miles v. Bull*. There was nothing devious or crafty concerning the action, and there was no need for any further investigation into the facts. There was nothing peculiar; on the contrary, the matter was quite plain, and anyone familiar with claims by purchasers for LD for late delivery of houses in Malaysia would have been familiar with the many cases that had been decided on the issue. The defendant's argument on this issue was dismissed. (paras 75, 77 & 78)

(5a) Regarding cl. 13.1.2 of the SPA, the defendant argued that 'such part of the purchase that had been paid by the purchaser to the developer' would be different from the full purchase price. This, however, was not included in the questions of law given leave. The court generally would not venture to answer questions raised for the first time. It was axiomatic that the ambit and scope of an appeal to the Federal Court from the Court of Appeal had to be confined to the questions of law for which leave was granted, for such an appeal was not as of right, nor was it by way of a re-hearing. The court was hearkened to the cautionary constraints issued in *Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor.* (paras 80, 81 & 84)

(5b) There was an impediment in allowing a new question of law to be ventilated, as both the High Court and the Court of Appeal had arrived at a concurrent finding that the summary judgment was rightly entered against the defendant. The defendant could not have argued an objection to a summary judgment application in stages, searching for a new triable issue or stumbling across it as it exhausted the last rung of appeal. It could not have improved its case through the tiers of appeal by supplementing what was lacking in the High Court and what had not been argued in the Court of Appeal. (para 85)

(5c) Although r. 57(2) of the Rules of the Federal Court 1995 conferred some discretion on this court to prevent a miscarriage of justice, this court was not satisfied that it should exercise the discretion to allow a fresh question of law to be answered when it had not been argued in the High Court nor in the Court of Appeal. The ends of justice did not demand it. The defendant's argument on this issue was without merit. (paras 88 & 91)

(5d) The purchasers could only make a claim for LD after they had taken vacant possession, after they had paid the full purchase price. The defendant, as a developer, should not have been allowed to take advantage of its own breach in failing to deliver vacant possession on time and then limit the calculation of the LD based on the amount of purchase price paid at the date of contractual delivery of vacant possession, when the purchasers had been able and willing to pay the full purchase price, as evidenced by the undisputed fact that they had done so upon taking vacant possession. To peg the calculation of the LD based on the amount of purchase price paid at the point of entering the late delivery period would have been to reward the developer for the delay. (paras 92-93)

A ***Bahasa Melayu*** *Headnotes*

Perayu ('defendan') adalah pemaju sebuah projek ('projek') manakala responden-responden ('plaintif-plaintif') adalah para pembeli unit-unit pejabat serba guna bersaiz kecil ('unit-unit') dalam projek itu. Kesemua plaintif telah memasuki perjanjian jual beli ('PJB') dengan defendan. Klausa
B 35A PJB mewajibkan defendan mendapatkan kedua-dua kelulusan penukaran dan rancangan bangunan ('kelulusan-kelulusan') untuk projek itu dalam tempoh 12 bulan dari tarikh PJB, dengan lanjutan enam bulan dibenarkan ('tempoh kelulusan' atau 'tempoh kelulusan lanjutan'). Seksyen 10 Jadual A bawah PJB menetapkan bahawa, 42 bulan kalendar selepas memperoleh
C kelulusan-kelulusan, defendan diwajibkan menyerahkan pemilikan kosong unit-unit pada plaintif-plaintif ('tempoh 42 bulan'). Defendan menyelesaikan penyerahan pemilikan kosong unit-unit pada 6 Oktober 2016, iaitu selepas penamatan tempoh 42 bulan. Di Mahkamah Tinggi, plaintif-plaintif memulakan tindakan untuk menuntut ganti rugi terlikuidasi ('GRT')
D daripada defendan ('tindakan') akibat kelewatan menyerahkan pemilikan kosong unit-unit. Plaintif-plaintif juga memfailkan permohonan untuk penghakiman ringkas bawah A. 14 Kaedah-kaedah Mahkamah 2012 ('KKM') ('permohonan'). Dalam membenarkan permohonan, Mahkamah Tinggi memutuskan bahawa, oleh kerana kedua-dua kelulusan diperoleh
E defendan pada 2 Ogos 2012, iaitu satu tarikh dalam tempoh kelulusan, pengiraan tempoh 42 bulan seharusnya bermula dari tarikh tersebut. Mahkamah Tinggi menolak pengataan defendan bahawa pengiraan tempoh 42 bulan itu bermula dari 17 November 2015, iaitu tarikh kelulusan terakhir pemindaan rancangan bangunan diperoleh, atau dari tarikh tamatnya tempoh
F 18 bulan yang merangkumi tempoh kelulusan 12 bulan dan tempoh kelulusan lanjutan selama enam bulan. Mahkamah Tinggi menyatakan tiada kekaburan dalam klausa-klausa PJB. Seksyen 10 Jadual A jelas mengawal pengiraan tempoh 42 bulan. Oleh kerana tiada isu yang perlu dibicara secara penuh timbul, dan tindakan cuma melibatkan persoalan tafsiran kontrak –
G yang merupakan soalan undang-undang – Mahkamah Tinggi memutuskan tindakan sesuai untuk diselesaikan melalui penghakiman ringkas ('keputusan Mahkamah Tinggi'). Terkilan, defendan memfailkan rayuan ke Mahkamah Rayuan. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Menurut Mahkamah Rayuan, berikutan PJB adalah kontrak komersial, tafsiran mengikut akal perniagaan yang lazim terpakai. Mahkamah Rayuan
H memutuskan tempoh 42 bulan itu bermula dari tarikh kelulusan pertama rancangan bangunan diperoleh, iaitu 2 Ogos 2012, yang membenarkan pembinaan projek dimulakan. Mahkamah Rayuan menekankan, melalui pembacaan kl. 13.1.1 PJB bersama-sama s. 10 Jadual A dan kl. 35A.1, PJB jelas menyatakan tempoh 42 bulan bermula dari tempoh kelulusan atau
I tempoh kelulusan lanjutan, yang ditakrifkan bermula dari tarikh kelulusan diperoleh terlebih dahulu – bukan dari tarikh mana-mana pindaan

diluluskan. Klausa-klausa tidak membenarkan tafsiran alternatif atau lanjutan, dan masa dinyatakan 'sebagai penting' bawah kl. 38.16. Selain itu, melalui pemakaian prinsip *contra proferentem*, oleh kerana defendan adalah penyusun PJB, apa-apa kekaburan berkenaan PJB tidak akan ditafsir secara memihak pada defendan. Tambahan lagi, melalui penggunaan prinsip *generalia specialibus non derogant*, Mahkamah Rayuan memutuskan pemakaian peruntukan umum diatasi oleh peruntukan khusus tentang tempoh 42 bulan ('keputusan Mahkamah Rayuan'). Maka rayuan ini oleh defendan. Di mahkamah ini, defendan memperoleh kebenaran untuk dua persoalan undang-undang, iaitu: (i) sama ada dalam kontrak jual beli hartanah komersial, apabila 'masa untuk menyerahkan pemilikan kosong' ditetapkan untuk dikira dari tempoh yang dinyatakan dalam kontrak untuk satu peristiwa yang berlaku dalam tempoh tersebut, pengiraan sepatutnya bermula dari tamat tempoh tersebut dan bukan sebelum tamatnya tempoh itu; dan (ii) sama ada dalam kontrak jual beli hartanah komersial, apabila 'masa untuk menyerahkan pemilikan kosong' ditetapkan untuk dikira dari tarikh kelulusan rancangan bangunan dan 'rancangan bangunan' ditakrifkan termasuk 'apa-apa pindaan, pengubahsuaian dan pengubahsuaian lain', pengiraan sepatutnya bermula dari tarikh kelulusan pertama/asli rancangan bangunan atau tarikh pindaan terakhir rancangan bangunan tertakluk pada tempoh yang ditetapkan. Selain itu, isu-isu berikut juga timbul: (i) sama ada persoalan undang-undang yang timbul daripada fakta yang tidak dipertikaikan boleh diselesaikan melalui permohonan penghakiman ringkas; (ii) sama ada atas sebab lain, perbicaraan penuh untuk tindakan tersebut perlu diadakan; dan (iii) sama ada defendan dibenarkan mengemukakan persoalan undang-undang baharu yang tidak termasuk dalam dua persoalan undang-undang yang diberikan kebenaran.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Rayuan dan Mahkamah Tinggi)
Oleh Lee Swee Seng HMP menyampaikan penghakiman mahkamah:

(1) Isu tentang tafsiran klausa-klausa berkaitan bawah PJB adalah persoalan undang-undang semata-mata, yang jelas berada dalam bidang kuasa mahkamah untuk diputuskan ketika mendengar permohonan penghakiman ringkas. Walaupun isu ini kadangkala memerlukan pertimbangan yang lebih teliti, terutamanya apabila terdapat autoriti-autoriti yang bertentangan, itu adalah satu perkara yang tidak memerlukan mahkamah mendengar saksi-saksi tentang pemahaman mereka terhadap klausa-klausa yang dipersoalkan, kecuali terdapat isu estoppel atau tindakan susulan oleh pihak-pihak yang menunjukkan wujud pindaan atau pengecualian terhadap terma-terma kontrak. Susulan itu, apabila fakta yang diperlukan untuk menentukan pertikaian tidak dipertikaikan, dan segala-galanya bergantung pada tafsiran klausa-klausa berkaitan – seperti dalam kes ini, dalam PJB

berkaitan tuntutan LD akibat kelewatan penyerahan – tindakan tersebut boleh diselesaikan sewajarnya melalui permohonan penghakiman ringkas.

(2a) 'Masa untuk penyerahan pemilikan kosong' telah dinyatakan secara objektif bawah s. 10 Jadual A, iaitu 42 bulan dari tarikh tempoh kelulusan atau tempoh kelulusan lanjutan. Seperti semua tempoh masa, itu bermula dari tarikh tertentu, yang mana dalam kes ini adalah dari 'tarikh tempoh kelulusan'. Oleh itu, jika tarikh kelulusan rancangan bangunan adalah selepas PJB dimasuki dan dalam tempoh 12 bulan dari tarikh PJB, maka tarikh itu dianggap sebagai tarikh tempoh 42 bulan bermula. Kelulusan penukaran diperoleh pada 17 Januari 2012, manakala rancangan bangunan diluluskan pada 2 Ogos 2012. Defendan telah mengambil tarikh 19 Ogos 2011 sebagai tarikh terawal PJB, yang menjadikan tarikh tamat tempoh kelulusan 12 bulan pada 19 Ogos 2012, dan tarikh tamat lanjutan enam bulan bawah tempoh kelulusan lanjutan pada 19 Februari 2013.

(2b) Tempoh 42 bulan sepatutnya bermula dari 2 Ogos 2012, iaitu 'dari tarikh tempoh kelulusan' dan bukan dari tarikh 'tamatnya' tempoh kelulusan, iaitu 19 Ogos 2012. Perkataan 'tamatnya' tidak terdapat dalam peruntukan tersebut, dan maksud peruntukan itu akan berubah secara drastik jika perkataan itu dibaca ke dalam peruntukan itu. Ungkapan 'tarikh tempoh kelulusan' hanya membawa maksud tarikh yang jatuh dalam tempoh kelulusan itu. Mahkamah tidak seharusnya membaca ke dalam s. 10 Jadual A perkataan yang tidak terkandung dalamnya, iaitu, 'dari tarikh tamat tempoh kelulusan'. Dalam kes ini, 'tempoh lanjutan kelulusan' tidak terpakai kerana kelulusan rancangan bangunan telah diperoleh dalam 'tempoh kelulusan'.

(2c) Sebagai satu perjanjian komersial, klausa-klausa yang berkaitan perlu ditafsirkan mengikut akal perniagaan yang lazim. Bertentangan dengan akal perniagaan yang lazim untuk mengatakan bahawa, walaupun kelulusan rancangan bangunan telah diperoleh sebelum tamatnya tempoh kelulusan, seseorang masih perlu menunggu sehingga tamatnya tempoh tersebut terutama apabila s. 10 Jadual A tidak menetapkan sedemikian. Selain itu, tidak rasional untuk menangguhkan tarikh permulaan kiraan masa untuk penyempurnaan, kerana pembinaan boleh sahaja dimulakan setelah rancangan bangunan diluluskan.

(2d) Tiada kekaburan. Jikapun ada, itu boleh diselesaikan secara memihak pada pembeli-pembeli, berikutan PJB telah disediakan oleh pemaju. Itu boleh ditafsirkan secara *contra proferentem* terhadap pihak yang menyediakan klausa standard.

(3a) Tafsiran bahawa tempoh 42 bulan bermula dari tarikh kelulusan terakhir pindaan rancangan bangunan bermakna tempoh tersebut boleh menjadi satu garis masa yang berubah-ubah atau bergerak. Sebelum apa-apa pindaan rancangan bangunan dihantar untuk kelulusan, tempoh 42 bulan adalah tetap, tetapi itu kemudian boleh dimulakan semula bergantung pada bilangan pindaan rancangan bangunan yang mungkin dihantar dan diluluskan kemudian. Tafsiran sebegitu tidak selaras dengan akal perniagaan yang lazim, dan itu bercanggah dengan peruntukan kl. 38.16, yang menetapkan bahawa masa, di mana-mana disebut, adalah inti kontrak berhubung semua peruntukan PJB. Klausa itu akan menjadi tidak berguna. Selain itu, tafsiran sebegitu juga akan membuka ruang untuk penyalahgunaan, kerana defendan, apabila menyedari tarikh penyiapan hampir tiba, boleh sentiasa menghantar pindaan lain – tidak kira sepenting mana – dan setelah diluluskan, boleh memperoleh lanjutan masa baharu untuk penyerahan pemilikan kosong.

(3b) Konteks adalah mustahak, dan itu telah digambarkan oleh perkataan-perkataan penerang dalam kl. 1.1 PJB, iaitu 'apabila konteks membenarkannya'. Itu tidak semestinya bermaksud, bahawa apabila setiap kali 'rancangan bangunan' disebut, itu mesti dibaca sebagai merangkumi 'rancangan bangunan yang dipinda, diubah, atau diubah suai'. Konteks tidak membenarkan tafsiran seperti itu. Susulan itu, walaupun maksud tatabahasa definisi 'rancangan bangunan' mungkin cukup luas untuk merangkumi semua, termasuk rancangan bangunan terakhir yang diluluskan, konteks tidak membenarkan tafsiran sedemikian untuk tujuan menentukan masa untuk penyerahan pemilikan kosong, yang sepatutnya bermula dari tarikh kelulusan pertama rancangan bangunan.

(3c) Melalui tafsiran secara kontekstual, harmoni dan akal perniagaan yang lazim, maksud tarikh kelulusan 'rancangan bangunan' tidak boleh meluas hingga ke tarikh kelulusan terakhir 'rancangan bangunan' untuk tujuan menentukan tempoh 42 bulan, walaupun secara pedantik dan mengikut definisi, 'rancangan bangunan' termasuk 'semua pindaan, pengubahsuaian, dan pengubahan pada rancangan bangunan'. Klausa 1.1, dengan perkataan penerang 'apabila konteks membenarkannya', menyebabkan mahkamah mempertimbangkan konteks definisi 'rancangan bangunan' sebelum memakainya pada kl. 13.1.1, s. 10 Jadual A, dan kl. 35A.1 serta 38.16.

(4) Fakta persoalan undang-undang mempunyai sedikit kerumitan maka memerlukan masa tambahan untuk difahami, tidak dengan sendirinya, membawa permohonan ini bawah ruang lingkup pengecualian bawah A. 14 k. 3 KKM, bawah kategori kes 'di mana atas sebab lain perlu diadakan perbicaraan untuk tuntutan tersebut', seperti dirujuk dalam

kes *Miles v. Bull*. Tiada apa-apa yang licik atau memperdaya berkaitan tindakan, dan tiada keperluan untuk apa-apa siasatan lanjut dijalankan terhadap fakta. Tiada apa-apa yang luar biasa; sebaliknya, perkara ini adalah jelas, dan siapa yang biasa dengan tuntutan pembeli untuk GRT akibat kelewatan penyerahan rumah di Malaysia pasti maklum tentang kes-kes yang telah diputuskan tentang isu ini. Berikutan itu, hujahan defendan berhubung isu ini ditolak.

(5a) Tentang kl. 13.1.2 PJB, defendan berhujah 'bahagian daripada harga belian yang telah dibayar oleh pembeli kepada pemaju' adalah berbeza dengan jumlah harga belian penuh. Walau bagaimanapun, perkara ini tidak termasuk dalam persoalan undang-undang yang telah diberikan kebenaran. Secara amnya, mahkamah tidak akan menjawab persoalan yang dibangkitkan buat pertama kali. Adalah satu prinsip asas bahawa skop dan lingkungan sesuatu rayuan ke Mahkamah Persekutuan daripada Mahkamah Rayuan hendaklah terhad pada persoalan undang-undang yang telah diberikan kebenaran, kerana rayuan sedemikian bukan hak automatik dan bukan juga satu perbicaraan semula. Mahkamah turut mengambil maklum amaran dan batasan berhati-hati yang dinyatakan dalam kes *Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor.*

(5b) Terdapat halangan untuk pengemukaan persoalan undang-undang baharu, kerana Mahkamah Tinggi dan Mahkamah Rayuan telah mencapai dapatan serentak iaitu penghakiman ringkas telah secara betul dimasukkan terhadap defendan. Defendan tidak boleh membantah permohonan penghakiman ringkas secara berperingkat, dengan mencari isu perbicaraan baharu atau menemukannya secara kebetulan apabila rayuan telah sampai ke peringkat terakhir. Defendan tidak boleh memperkukuh kesnya melalui peringkat-peringkat rayuan dengan menambah perkara yang kurang di Mahkamah Tinggi dan yang tidak dihujahkan di Mahkamah Rayuan.

(5c) Walaupun k. 57(2) Kaedah-kaedah Mahkamah Persekutuan 1995 memberikan budi bicara pada mahkamah untuk mengelakkan ketidakadilan, budi bicara itu tidak perlu digunakan untuk membenarkan persoalan undang-undang baharu apabila itu tidak pernah dihujahkan di Mahkamah Tinggi dan Mahkamah Rayuan. Itu tidak diperlukan oleh keadilan. Sehubungan itu, hujahan defendan tentang isu ini tidak bermerit.

(5d) Pembeli-pembeli hanya boleh membuat tuntutan GRT selepas mengambil pemilikan kosong, iaitu selepas membayar harga belian penuh. Defendan sebagai pemaju tidak sepatutnya dibenarkan mengambil kesempatan atas pelanggaran kontraknya sendiri kerana gagal menyerahkan pemilikan kosong tepat pada masanya, dan kemudian menghadkan pengiraan GRT berdasarkan jumlah harga

belian yang telah dibayar pada tarikh penyerahan pemilikan kosong secara kontraktual, sedangkan pembeli-pembeli mempunyai keupayaan untuk membayar harga belian penuh, seperti dibuktikan oleh fakta yang tidak dipertikaikan bahawa mereka telah berbuat demikian setelah mengambil pemilikan kosong. Penetapan pengiraan GRT berdasarkan jumlah harga belian yang telah dibayar pada permulaan tempoh kelewatan akan memberi ganjaran pada pemaju atas kelewatan tersebut.

Case(s) referred to:

Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals [2023] 7 CLJ 705 CA ***(refd)***

Arbuthnott v. Fagan [1995] CLC 1396 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd [1990] CLJU 41; [1990] 1 LNS 41 ***(refd)***

Diamond Peak Sdn Bhd & Anor v. Tweedie [1980] CLJU 17; [1980] 1 LNS 17 FC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] CLJU 18; [1979] 1 LNS 18 PC ***(refd)***

Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] CLJU 31; [1972] 1 LNS 31 HC ***(refd)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; [1981] CLJ (Rep) 53 FC ***(refd)***

Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896

Melawangi Sdn Bhd v. Tiow Weng Theong [2020] 4 CLJ 1 FC ***(refd)***

Miles v. Bull [1968] 3 All ER 632 ***(refd)***

Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor [2018] 4 CLJ 705 FC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***

Teoh Kiang Hong v. Theow Say Kow & Other Appeals [2025] 2 CLJ 683 FC ***(refd)***

The News Straits Times Press (Malaysia) Bhd v. Aideah Communication Sdn Bhd [2025] 5 CLJ 661 FC ***(refd)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 69(1), 96

Rules of Court 2012, O. 14 r. 3

Rules of the Federal Court 1995, rr. 47(4), 57(2)

Rules of the Supreme Court 1957, O. 14

For the appellant - Justin Voon Tiam Yu & Lim Xin Yi; M/s Justin Voon Chooi & Wing
For the respondent - Low Joo Hean & Chan Kim Weng; M/s Ching Tan & Assocs

[Editor's note: For the Court of Appeal judgment, please see Icon City Development Sdn Bhd v. Lee Kean Hwa & Ors & Other Appeals [2025] CLJU 1577 (affirmed); For the High Court judgment, please see Lee Kean Hwa & Ors v. Icon City Development Sdn Bhd [2022] CLJU 2795; [2022] 1 LNS 2795 (affirmed).]

Reported by Syamim Ariffin

JUDGMENT

Lee Swee Seng FCJ:

[1] This appeal originated from the plaintiffs' application for summary judgment pursuant to O. 14 of the Rules of Court 2012 ("ROC 2012"), premised on a claim for liquidated damages (LD) due to the late delivery of vacant possession under the terms of the sale and purchase agreements (SPA) entered into between the parties.

[2] The appeal involved a claim by 62 individuals as plaintiffs who had each entered into SPAs with the property developer, Icon City Development Sdn Bhd (formerly known as Sierra Peninsular Development Sdn Bhd), the defendant, for the purchase of stratified mixed commercial and residential units, namely small office versatile office ("SOVO") units located in Tower 3 and Tower 3A of a development project.

[3] Pursuant to the SPA, the defendant was required under cl. 35A to obtain both the (i) conversion approval for the land and (ii) building plan approval. These approvals were to be obtained within 12 months from the date of the SPA, with a further extension of six months permitted, collectively referred to as the approval period or extended approval period.

[4] Section 10 of Schedule A of the SPA provided that delivery of vacant possession of the property was to be within 42 calendar months from the date of the approval period or the extended approval period.

In The High Court

[5] In their summary judgment application, the plaintiffs contended that the 42-month period should be computed from 2 August 2012, being the date when both requisite approvals were obtained. By this calculation, delivery of vacant possession was due on 1 February 2016.

[6] The plaintiffs alleged that, as delivery occurred after that date, they were entitled to LD for the period of delay, calculated at the contractual rate of ten percent per annum on the purchase price, on a daily rest basis.

[7] Meanwhile, the defendant disputed this interpretation and contended that the 42 period should instead commence from 17 November 2015 (the date of the last building plan amendment) or, alternatively, from the expiry of the full 18 months approval period. The defendant further submitted that these competing interpretations gave rise to triable issues, rendering the matter unsuitable for summary judgment.

[8] The relevant factual chronology and key timeline were as follows:

No.	Dates	Details
	17 January 2012	The Defendant obtained approval from the Local Authority (LA) for the conversion of the use of land to commercial use.
	2 August 2012	The LA's first approval of the Defendant's building plans obtained.
	17 November 2015	The LA's last approval for amendments to the Building Plans for Tower 3 in the Development Area (Tower 3).
	20 November 2015	The LA's last approval for amendments to the Building Plans for Tower 3A in the Development Area (Tower 3).
	2 September 2016	The Defendant issued vacant property notice to the purchasers for Tower 3.
	15 September 2016	Deemed delivery of vacant possession for Tower 3 units
	22 September 2016	The Defendant issued vacant property notice to the purchasers for Tower 3A.
	6 October 2016	Deemed delivery of vacant possession for Tower 3A units

[9] The High Court determined that the central legal issue was the correct date from which the 42-month period for delivering vacant possession should begin.

[10] The learned High Court Judge was of the view that cl. 35A of the SPA required the defendant, as developer, to obtain both the conversion approval and the building plan approval. The conversion approval was obtained on 17 January 2012, and the building plan approval was obtained on 2 August 2012.

[11] As both approvals were obtained within the 12-month approval period contemplated by the SPA, the High Court held that the computation of the 42 months must begin from 2 August 2012.

[12] The High Court rejected the defendant's suggestion that the computation should begin from either 17 November 2015, being the date of approval of the last amended building plan, or from the expiry of 18 months comprising the 12 month period and the six-month extension.

[13] The High Court found no ambiguity in the relevant SPA clauses. Section 10 of Schedule A clearly governed the computation period. The High Court also found that there were no triable issues warranting a full trial. The material facts, including the dates of approval and delivery, were not disputed and were evidenced by documentation.

[14] The dispute involved a question of contractual interpretation, which was a matter of law. As such, it was suitable for determination by way of summary judgment under O. 14 of the ROC 2012.

[15] The High Court found the material facts, including approval timelines and SPA terms, to be clear and undisputed. The dispute was purely a legal one on contract interpretation. As the terms were unambiguous, the High Court held that it was a fit and proper case to grant summary judgment.

In The Court Of Appeal

[16] The defendant appealed to the Court of Appeal. The Court of Appeal upheld the High Court's decision to grant summary judgment, concluding that the SPAs were commercial contracts and as such the business common sense interpretation is to be applied in reading the SPAs.

[17] In doing so, the Court of Appeal rejected the defendant's contention that the 42-month period for delivery of vacant possession should begin from the last amended building plan approval. Instead, the court determined that the said period commenced from the first approval of the building plans, which had enabled construction to begin, making this interpretation commercially sensible and consistent with the SPA's terms.

[18] The court emphasised that cl. 13.1.1, read together with s. 10 of Schedule A and cl. 35A.1, clearly stated that the 42-month delivery timeline started from the period of approval or extended approval period, defined as beginning on the date the requisite approvals (conversion and building plans) were first obtained, not from any subsequent amendments. The clause did not allow for alternative or extended interpretations, and time was expressly made "of the essence" under cl. 38.16.

[19] Moreover, the court applied the *contra proferentem* rule, resolving any potential ambiguity against the appellant, who had drafted the SPAs.

[20] The Court of Appeal further applied the well-established O. 14 test for summary judgment under the ROC 2012, which required the plaintiffs to show that the defendant had no arguable defence.

[21] The court concluded that the interpretation of the commencement date was purely a question of law, not fact or a mixed question, and found that the defendant had failed to raise any genuine triable issue or compelling reason for a full trial.

[22] Additionally, the Court of Appeal dismissed the defendant's reliance on para. 6 of the recital and cl. 12.5, provisions that permitted building plan amendments, on the basis that these clauses had no bearing on the delivery timeline, which was governed solely by cls. 13.1.1, 35A.1, and Schedule A. Applying the interpretive maxim *generalia specialibus non derogant*, the court found that these specific provisions on timelines prevailed over more general ones.

[23] The Court of Appeal found no error of law by the High Court in its interpretation of the SPAs, affirmed the summary judgment and dismissed the defendant's appeal with costs.

In The Federal Court

[24] On 16 January 2025, the defendant was granted leave to appeal on the following two questions of law and they are as follows:

(i) first question of law

Whether in a sale and purchase contract for commercial property, when the "time for delivery of vacant possession" is provided to be calculated from a date of a period of time set out in the said contract for an event which occurred within the said period of time, whether the said calculation ought to begin from the expiry of the said period of time and not prior to the said expiry?

(Sama ada dalam suatu perjanjian jual beli untuk hartanah komersil, apabila "masa untuk penyerahan milikan kosong" diperuntukkan untuk dikira dari suatu tarikh tempoh masa yang diperuntukkan dalam kontrak tersebut untuk sesuatu peristiwa yang akan berlaku dalam tempoh masa tersebut, sama ada pengiraan tersebut harus bermula dari tamat tempoh masa tersebut dan bukannya sebelum tamat tempoh masa tersebut?)

(ii) second question of law

Whether in a sale and purchase contract for commercial property, when the "time for delivery of vacant possession" is provided to be calculated from a date of a period of time for approval of building plans and "building plans" has been defined to include "any and all such amendments, alterations and modifications thereto", whether said calculation ought to begin from the date of the first/original approval of the building plan or the relevant date of the last amendment of the building plan subject to the prescribed said period of time?

(Sama ada dalam suatu perjanjian jual beli untuk hartanah komersil, apabila "masa untuk penyerahan milikan kosong" diperuntukkan untuk dikira dari suatu tarikh tempoh masa untuk kelulusan pelan-pelan bangunan dan pelan-pelan telah didefinisikan untuk merangkumi "mana-

A mana dan kesemua pindaan, pengubahsuaian dan modifikasi yang sedemikian kepada yang sama" ("any and all such amendments, alterations and modifications thereto"), sama ada pengiraan tersebut harus bermula dari tarikh kelulusan pelan-pelan bangunan yang pertama/asal atau tarikh yang relevan untuk pindaan terakhir pelan B bangunan tertakluk kepada tempoh masa yang diperuntukkan?)

Whether A Question Of Law Arising From Facts Not In Dispute May Be Disposed Of By Way Of A Summary Judgment Application

[25] The principles of law governing summary judgment is trite and known to all who appear before our courts and more so those who appear before the C apex court. It is eminently suitable for cases where the facts are indisputable and undeniable and a case where the court needs only to apply the law.

[26] As is often the case, the respondent to a summary judgment application may in its affidavit to oppose raise matters that are said to be amenable to D resolution only after a trial is had on ground apparently that there is a conflict of affidavit evidence. The court does not need to immediately wring its arms and conclude that the matter ought to proceed to trial and the summary application dismissed. If that be the case then it would be very easy to thwart any application for summary judgment and in the process the whole purpose of summary judgment in saving the court's time and in preventing abuse of E the court's process in raising frivolous and unmeritorious claims would have been skirted.

[27] The court confronted with such a conflict of affidavit evidence which would weigh and consider if the denials are equivocal, lacking in precision, F inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, following the advice of Lord Diplock speaking for the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18; [1979] MLJ at p. 217.

G **[28]** This underlying philosophy and approach was well captured in the Supreme Court case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400 where Mohamed Azmi FCJ for the majority said:

> In our view, basic to the application of all those legal propositions, is the H requirement under O. 14 for **the Court to be satisfied on affidavit evidence that the defence not only has raised an issue but also that the said issue is triable.** The determination of whether an issue is or is not triable must necessarily depend on the law arising from each case as disclosed in the affidavit evidence before the Court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking for the Privy Council in *Eng* I *Mee Yong & Ors. v. V. Letchumanan* [1979] MLJ had this to say at p. 217:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a Judge has to decide a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> (emphasis added)

[29] Thankfully, in the appeal before us, the key facts necessary to decide on liability for a late delivery claim in LD by purchasers of an office unit from a developer are not in dispute. What is in dispute is the interpretation of the relevant clauses in the SPA with respect to completion period or time of delivery of vacant possession and consequently the calculation of the LD.

[30] That issue of interpretation of contract is a pure question of law which is plainly within the purview of the court to decide in hearing a summary judgment application. Sometimes, the issue of interpretation may require a more careful consideration especially when there are conflicting authorities. However, it is an exercise that does not require the court to hear witnesses on their understanding of the relevant clauses in question.

[31] Rarely would factual witnesses be necessary to give oral evidence as to what they understood the contract to mean unless there are issues of estoppel and subsequent course of conduct of the parties pointing to a variation or waiver of certain terms in a contract. Thus, where the facts necessary to decide a dispute are not in issue and everything hinges on the interpretation of the relevant clauses as in this case, in the SPA with respect to a claim for LD for a late delivery claim, such a claim can be more than appropriately disposed of by way of a summary judgment application.

[32] The Supreme Court in *Bank Negara Malaysia* (*supra*) had given approval to this approach in dealing with a question of law in a summary judgment application as follows:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand". (See *Cow v. Casey* [1949] All ER 197; and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at 516).

[33] This approach is nothing new. As far back as the case of *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] CLJU 31; [1972] 1 LNS 31; [1972] 1 MLJ 168, Raja Azlan Shah J, as His Royal Highness then was in the Kuala Lumpur High Court, had held under the then O. 14 of the Rules of the Supreme Court 1957 as follows:

> It is I think right that an order under R.S.C. Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. *If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.*
>
> I am satisfied that there are no triable issues. This is simply a case of construction of the letters passed between the parties and I decided that in favour of the plaintiffs. I therefore allowed the application with costs. (emphasis added)

[34] His Lordship later as CJ (Malaya) also reiterated the same approach in the case where a decision would hinge on the interpretation of relevant provisions in a statute and thus a pure question of law in the Federal Court case of *Fadzil Mohamed Noor v. Universiti Teknologi Malaysia* [1981] CLJ 85; [1981] CLJ (Rep) 53; [1981] MLJ 196. In allowing summary judgment, the Federal Court held at pp. 58 to 59 (CLJ); p. 199 (MLJ) as follows:

> … An Order 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases. If the University and University Colleges Acts and related legislation come into an Order 14 case, attention in principle is to be given by the court to that class of action than to any other class of action. The only point is that as everybody knows the pertinent legislation is long and complicated. But it is not sufficient under an Order 14 case to flourish the title of the University and University Colleges Act, *etc.*, in the face of the court and say that is enough to give leave to defend. *If a point taken under the Acts is quite obviously an unarguable point, and the court is satisfied that it is really unarguable, the court has precisely the same duty under Order 14 as it has in any other case.* The court has the duty to apply the rule: (see *Harry Tong Lee Hwa v. Yong Kah Chin* [1981] 2 MLJ 1).

> In *Esso Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd*. I pointed out that in an Order 14 case, where it turned on the construction of a few documents, and the court was only concerned with what, in its judgment, was the true construction, there could be no reason to go formally to trial where no further facts could emerge which would throw any light on the documents that had to be construed. We think we can safely apply that principle to the present case. On the view we have taken of the construction of Act 30 of 1971, and the Constitution of the University, the University had an absolutely hopeless case. The only function of the court is jus dicere and to ascertain the intention of Parliament from the words used in the statutes and nothing more. No useful purpose would then be served to go formally to trial.
>
> (emphasis added)

[35] The question of construction or interpretation of the relevant clauses in the contract may require longer scrutiny in some cases where parties take a diametrically different stance, but as no further facts and indeed nothing new would emerge at the trial, there is no necessity to proceed to decide that issue of construction of documents at trial merely because the exercise of construction posed some considerable difficulties.

[36] The court in construing the documents may agree with the plaintiff applicant in which case it is perfectly proper to allow a summary judgment to be entered even though the claim may be for a huge sum.

[37] In the event that the court does not agree with the applicant where the construction of the clauses are concerned, the court is not at liberty to strike out the plaintiff's claim but merely to dismiss the summary judgment application and to give the defendant unconditional leave to defend. The defendant in the suit may want to take the cue and apply for the plaintiff's claim to be struck out. See the case of *Diamond Peak Sdn Bhd & Anor v. Tweedie* [1980] CLJU 17; [1980] 1 LNS 17; [1980] 2 MLJ 31.

Whether The "Time For Delivery Of Vacant Possession" Is To Be Calculated From A Date Of A Period Of Time Set Out In The Said Contract For An Event Which Occurred Within The Said Period Of Time, Or Whether The Said Calculation Ought To Begin From The Expiry Of The Said Period Of Time

[38] The relevant clauses in the SPA are set out below:

> 13.1 Delivery of vacant possession
>
> 13.1.1 The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this Agreement within the period stated in Section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by reason of the Purchaser requiring the

execution of any addition, works or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.

13.1.2 In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1, the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

35A.1 The Developer shall at its own costs and expense obtain the following:

(a) the Conversion Approval from the Appropriate Authority; and

(b) the approval of the Building Plans;

within twelve (12) months from the date of this Agreement (hereinafter referred to as "the Period of Approval") and subject to a further extension of six (6) months from the expiry of the Approval Period (hereinafter referred to as "the Extended Approval Period").

38.16 Time

Time wherever mentioned shall be of the essence of the contract in relation to all provisions of this Agreement.

Section 10 to Schedule A

7. Agreed Rate

Ten per cent (10%) per annum on daily rests (before as well as after court order or judgment)

10. Time for delivery of vacant possession Forty-Two (42) calendar months from the date of the Period of Approval or the Extended Approval Period.

[39] Without doubt the "time for delivery of vacant possession" is vitally important because that would be the basis for calculating LD for late delivery which would run after the expiry of the "time for delivery of vacant possession". Generally, there is no problem ascertaining when the "time of

delivery of vacant possession" should be because it is pegged to an objective date which in the standard form SPA under Schedule G or H under the Housing Development (Control and Licensing) Regulations 1989 ("HDR") is 24 months or 36 months respectively from the date of the SPA.

[40] However, in this case the appellant as the developer was keen to have the SPA signed even before the approval of the building plans. The developer can have its own bespoke SPA because a SOVO or an office unit is not governed by the Housing Development (Control and Licensing) Act 1966 ("HDA") and the regulations made thereunder as the Act governs the construction of "housing accommodation" and not "office".

[41] The "time for delivery of vacant possession" had been objectively stated under s. 10 (Schedule A) to be 42 months from the date of the period of approval or the extended approval period. Like all period of a time it runs from a specific date and here it is firstly "the date of the period of approval".

[42] Thus, if the date of approval of the building plans is on a date after the SPA was signed and within the period of the 12 months from the date of the SPA, then that date is taken to be the date from which the 42 months is calculated. Here the conversion approval was on 17 January 2012 and the building plans were approved by the local authority on 2 August 2012. Learned counsel for the appellant took the earliest SPA date as 19 August 2011 which would then yield the expiry of the 12 month period of approval to be 19 August 2012 and the further extension of six months under the extended approval period to be 19 February 2013.

[43] The 42 months to deliver vacant possession should then run from 2 August 2012 which is "from the date of the period of approval and NOT from the date of the expiry of the period of approval which is 19 August 2012 as the words underlined are not there and the meaning of the provision would be changed drastically if we were to read into the provision the underlined words that are not there. The expression "the date of the period of approval" can only mean the date that falls within the period of approval.

[44] We must restrain from reading into the provision of s. 10 (Schedule A) words that are not there, *ie*, "from the date of the expiry of the period of approval". Here the "extended approval period" is not engaged as the building plans approval had come during "the period of approval".

[45] Being a commercial agreement, the relevant clauses must be interpreted in a business common sense manner. It does not comport with business common sense to say that whilst the building plans approval had been before the expiry of the approval period, one must still wait for the expiry of the period of approval when s. 10 does not say that. There is also no rationale for postponing the date and time starts to run for completion since construction can already be commenced once the building plans are approved.

[46] The Federal Court speaking through Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464, explained the essence of this business common sense method of interpretation as follows:

> [68] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear. It is noteworthy that the same approach was taken by Lord Hodge (in the majority decision of *Arnold v. Britton*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 para 21 that:
>
> > ... if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

[47] Perhaps the drafter of the relevant clause in s. 10 (Schedule A) was also catering to a situation where the building plans approval had not been obtained even after the expiry of the 18-month waiting period called the "extended approval period" in which case the argument can be made that the 42 months starts from the expiry of the extended approval period.

[48] Such a necessity to so interpret does not justify taking the expiry of the approval period for the purpose of calculating LD in a case like the present where the building plans approval was obtained before the expiry of the approval period. It also does not justify taking the expiry of the extended approval period to calculate the 42 months for "the time of delivery of vacant possession" in a case where the building plans approval was obtained after the expiry of the approval period and before the expiry of the extended approval period.

[49] Learned counsel for the appellant submitted that a "date of a period of approval" is not a usual specified date as in this case the building plans approval. We understand a date to be an objective date that belonged to a "period of approval" and not a "date at the expiry of the period of approval". A period of time is between two dates and in this case a commencement date and an expiry date. A building plans approval date falling within a commencement date and an expiry date would be the date of "a period of approval".

[50] It can also be discerned that the relevant calculation under cl. 13.1.2 is that the LD shall be calculated "from the date of expiry of the period stated in s. 10 of Schedule A hereto or the extended date" which is different from the "date of the period of approval or the extended approval period", the former being an objectively referenced date from the date of the first approval of the building plans and not "from the date of expiry of the period", the latter being 19 August 2012.

[51] We do not find any ambiguity here and even if there is, it is to be resolved in favour of the purchasers as the SPA was drafted by the developer and ought to be interpreted *contra proferentem* against the party that drafted the standard form clauses. See the Court of Appeal case of *Abd Rahman Soltan & Ors v. Federal Land Development Authority & Anor And Other Appeals* [2023] 7 CLJ 705; [2023] 4 MLJ 318, at [52].

Whether When The "Time For Delivery Of Vacant Possession" Is Provided To Be Calculated From A Date Of A Period Of Time For Approval Of "Building Plans" Which Has Been Defined To Include "Any And All Such Amendments, Alterations And Modifications Thereto", Then Should The Calculation Begin From The Date Of The First/Original Approval Of The Building Plans Or The Relevant Date Of The Last Amendment Of The Building Plans Subject To The Prescribed Said Period Of Time

[52] Clause 1.1 provides that in the SPA, "where the context so admits, the following expressions shall have the following meanings":

> "Building Plans" "shall include any and all such amendments, alterations and modifications to the Building Plans."

[53] Clause 35A.1 and 38.16 further provide as follows:

> 35A Conversion Approval And Approval Of Building Plans
>
> 35A.1 The Developer shall at its own costs and expense obtain the following:
>
> (a) the Conversion Approval from the Appropriate Authority; and
>
> (b) the approval of the Building Plans;
>
> within twelve (12) months from the date of this Agreement (hereinafter referred to as "the Period of Approval") and subject to a further extension of six (6) months from the expiry of the Approval Period (hereinafter referred to as "the Extended Approval Period").
>
> 38.16 Time
>
> Time wherever mentioned shall be of the essence of the contract in relation to all provisions of this Agreement.

[54] Learned counsel for the appellant in the Court of Appeal tried unsuccessfully to persuade the court that since the definition of "building plans" shall "include any and all such amendments, alterations and modifications to the building plans" then as a consequence the time of approval of the "building plans" would be the date of approval of the last approval of the amended "building plans".

[55] The Court of Appeal was of the view that the business common sense interpretation of cl. 13.1.1 read with s. 10 (Schedule A) would be that the 42 months is from the date of the "period of approval" or "extended approval period" of the local authority's first approval of the building plans and not on the local authority's last approval of the amended building plans.

[56] The Court of Appeal found that it was very clear that the 42 months time period commenced "from the date of the period of approval or the extended approval period" which "period of approval" in turn commenced from the date of the SPA under cl. 35A.1 and subject to a further extension of six months from the expiry of the "period of approval". The Court of Appeal reasoned that once the appellant had obtained the local authority's first approval of the building plans, the appellant could immediately start the construction of the development area.

[57] If we may add, the appellant's interpretation of making the 42 months run from the date of the last approval of the amended building plans would mean that the 42 months to deliver vacant possession can be a moving or roving time as before any amended building plans were submitted for approval, the 42 months is fixed but then it can recommence at a later date depending on the number of amended building plans that may be subsequently submitted which the local authority may approve!

[58] That kind of an interpretation would not comport with business common sense and indeed it would fly against the provision of cl. 38.16 that had made time wherever mentioned to be of the essence of the contract in relation to all provisions of the SPA. Indeed cl. 38.16 would be rendered otiose and denuded of any meaning.

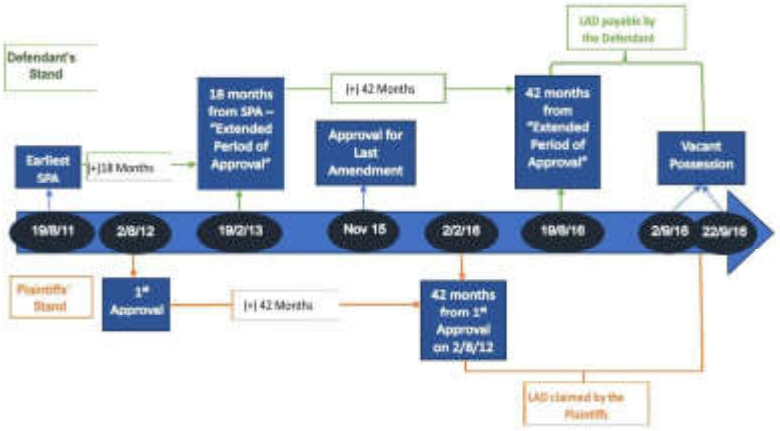
[59] Such an interpretation would also be a fertile ground for abuse as the appellant sensing that completion would be due can always put in another amendment no matter how minor and once approved by the local authority, would secure a fresh extension of time to deliver vacant possession.

[60] No evidence had been alluded to in the affidavit to oppose the summary judgment as to the kind of amendments represented in the last approval by the local authority and how that last approval of the amended building plans had affected the construction of the buildings that could have commenced from the date of the first approval of the building plans.

[61] Where a harmonious interpretation can be had by reading the various clauses in tandem with one another, then that is to be preferred rather than a disjointed reading that keeps extending the time of delivery of vacant possession irrespective of how many amended building plans there may be.

[62] Before us in the Federal Court, the appellant has mellowed and settled for the fact that since the date of the last approval of the amended building plans was in November 2015, then the time of delivery of vacant possession of 42 months should run from the expiry of the "extended period of approval" on 19 February 2013 in which case the time for delivery of vacant possession should be on 18 August 2016 instead of 2 February 2016, therefore reducing substantially the delay to be between 19 August 2016 and 2 September 2016 or 22 September 2016 being the undisputed dates of delivery of vacant possession.

[63] The appellant's summary of the argument in a flow chart timeline is reproduced below for ease of comparison between the appellant's and the respondents' arguments:



[64] At the risk of repetition, we reiterate that 42 months "from the date of the period of approval" means 42 months from the date of the first approval of the building plans and not 42 months from the last approval of the amended building plans which in any event, according to the appellant, should run from "the date of … the extended approval period" since the last approval was after the date of the extended approval period.

[65] We hasten to add that context is paramount and this is captured by the qualifying words in cl. 1.1 of the SPA, "where the context so admits". It does not necessarily mean that each time the expression "building plans" appear one must read it to cover "amended or altered or modified building plans". The context may not justify that interpretation as to allow that would mean that even though the building plans had been approved, the time to deliver vacant possession would be extended each time an amended building plan is approved by the local authority such that if the last approval is past the "extended approval period" then the last date of that period is taken as the commencement date of the calculation of the 42 months to deliver vacant possession.

[66] The various references to "building plans" to include "amended building plans" is to highlight the fact that the purchasers cannot annul the SPA and that neither party shall make further claims for damages or compensation on the other arising out of the amended building plans. This is clearly discerned from recital (6) to the SPA where the context for the need to amend the building plans was set out as follows:

(6) The Purchaser acknowledges that at the time of signing of this Agreement, *the Purchaser is fully aware of the possibility of changes to the drawings and plans annexed hereto in respect of the said Parcel* (as defined below) and/or any components within the said Project and/or Phase 2 as may be required by the Developer's architect and/or the Appropriate Authorities, as the case may be. *The Purchaser fully accepts such changes (if any) and the changes (if any) shall not entitle the Purchaser to annul this Agreement or nor shall it be the subject of any claim for damages or compensation by the Purchaser.* (emphasis added)

[67] This is further reiterated in the following cls. 12.5 and 35.5:

12.5 Developer's right to amend plans of the said Parcel

The Purchaser hereby acknowledges and agrees that the Developer shall be entitled from time to time to make such amendments, variations or substitutions thereto as may be required by the Appropriate Authority from time to time or as the Developer's architect shall consider expedient and/or necessary to the said Parcel and/or the Building Plans *without Incurring any liability of any kind whatsoever to the Purchaser in respect hereof, and the Purchaser is not entitled to annul this Agreement nor be entitled to any reduction of the Purchase Price or any damages in respect thereof* PROVIDED ALWAYS THAT any such alteration or substituted materials shall be of approximately the some quality and standard of workmanship as that set out in the plans. details and specifications contained in this Agreement. …

35.5 The said Parcel to form part of the Development

The Purchaser has notice of and hereby acknowledges that the said Parcel forms part of the overall Development and by reason whereof the condition state nature and character of the overall Development may be altered from time to time during the continuance of such development. Notwithstanding the provisions herein, the Purchaser hereby covenants and agrees that *no such alterations of the Building Plan or any other plan, condition and state of the parcels and/or the Development shall annul this Agreement or be subject to any claim for damages or compensation on by either party* and the Purchaser hereby covenants that the Purchaser shall accept and be deemed to be satisfied with the said Parcel in the condition and state as on the date of completion of the development. The Developer may, if it so decides, constructs additional buildings and/or additional storeys and/or additional works in relation to the Development. (emphasis added)

[68] Thus, where the grammatical meaning of the definition of "building plans" would be wide enough to cover even all and any including the last approved building plans, the context does not admit it for the purpose of determining the time for delivery of vacant possession which is to run from the date of the first approval of the building plans.

[69] Principles of interpretation of contract have moved from a rigid literal grammatical and internal linguistic consideration to that of a purposive reading based on the factual matrix of facts within the context of the transaction in question as representing the reading of the relevant clauses of the contract as a whole. No contracts are made nor come into existence in a vacuum. It has a setting that is captured in the recital with words having its proper shade in its colour borne out from its context and its proper scope in its contours being evident in the whole context of the contract.

[70] This dynamic and discerning approach can be seen in the speech of Sir Thomas Bingham in *Arbuthnott v. Fagan* [1995] CLC 1396 at 1400 in the Court of Appeal as follows:

> Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as **the context, the background, the factual matrix or the mischief.** To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it was expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he meant. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: **the instrument must speak for itself, but it must do so *in situ* and not be transported to the laboratory for microscopic analysis.**
>
> (emphasis added)

[71] Lord Hoffmann in the House of Lord's decision in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 at 913 further distilled this approach in some five principles laid down of which the principles (4) and (5) as set out below would be relevant:

> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. *The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.*
>
> > The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945).
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

A On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v. Salen Redevierna AB* (1985) 1 AC 191, 201:

B *… detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.*

(emphasis added)

[72] Applying what has been variously called the contextual, harmonious C and business common sense approach, we are more than satisfied that the meaning of the date of the approval of "building plans" cannot stretch to that of the date of the last approval of "building plans" for the purpose of determining the 42 months to deliver vacant possession even though pedantically and definition-wise "building plans" would include "all D amendments, alterations and modifications to the building plans".

[73] Clause 1.1 with the qualifying words of "where the context so admits" constrains us to consider the context of the definition of "building plans" before applying it in particular to cl. 13.1.1, s. 10 of Schedule A, cls. 35A.1 and 38.16.

E *Whether There Ought For Some Other Reason To Be A Trial Of The Claim*

[74] In what appears to be a valiant attempt to persuade this court to allow the appeal and to have the issues tried in a full trial, learned counsel for the appellant argued that the principle in *Miles v. Bull* [1968] 3 All ER 632 would F apply to justify a trial of the issues.

[75] The fact that the question of law is at first blush of some complexity and therefore takes a little longer to understand, does not by itself bring the application within the exception under O. 14 r. 3 of the ROC under the rubric of where "there ought for some other reason to be a trial of that claim" G in what is popularly referred to as the principle in *Miles v. Bull* [1968] 3 All ER 632. In that case it was stated as follows at pp. 637 to 638:

… If the defendant cannot point to a specific issue which ought to be tried, but nevertheless *satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases* H *when the plaintiff ought to be put to strict proof of his claim and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff …*

…

I think it is. In my judgment 'there ought for some other reason to be a I trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant

> from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he claims without being put to strict proof that they do enable him to evict the defendant. I was told that in granting leave to defend Master Jacob said that the case was too near the bone for O. 14. That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. *RSC Ord 14, is for the plain and straight-forward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.* (emphasis added)

[76] The above principle in *Miles v. Bull* (*supra*) was applied in *Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd* [1990] CLJU 41; [1990] 1 LNS 41; [1990] 3 MLJ 1, a Singapore High Court case and the Federal Court case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151; [1999] 1 MLJ 657 at p. 668 as follows:

> In the present appeal, there are circumstances which, in our opinion, constitute 'some other reason to be a trial'. First, although the defendants barely denied that they were constructive trustees for the deposited amount for and on behalf of the Majlis, the onus was on the Majlis to prove their claim. Indeed, on the authority of *Lipkin Gorman*, the law on constructive trustee in the context of banker/customer relationship is quite complicated and technical in nature, and that being so, a claim based on it could only be properly proved by oral evidence. Secondly, the evidence about the two fixed deposit receipts No 209431 and 209451 disclosed at the criminal trial of the Majlis's former President, Dato' Rahmat, may have a bearing on the present case. Needless to say the two fixed deposit receipts are crucial to the defendants' entire defence in the case. Both parties were unaware of the criminal proceedings until, as we have said, counsel were put to notice at one of the earlier hearings of this appeal. Therefore, in the interest of justice, it is desirable that the defendants be given every opportunity to examine fully the record of the criminal proceedings, which inevitably may provide them some materials for their defence.

[77] In the present appeal, there is nothing devious or crafty where the claim is concerned and neither is there any need for any further investigation into the facts. There is nothing peculiar but on the contrary, something quite plain and anyone familiar with the claim by purchasers of LD for late delivery of houses in Malaysia would be familiar with the many cases that have been decided on the issue. It is a very well-trodden area of the law and not a venturing into a domain where the route has not been charted.

[78] We therefore dismissed the argument of learned counsel for the appellant that the difficulties presented in interpreting the relevant provisions on LD claim would bring this claim within the rubric of O. 14 r. 3 where "there ought for some other reason to be a trial of that claim".

Whether The Appellant May Be Allowed To Raise A Fresh Question Of Law Not Raised In The Two Questions Of Law For Which The Federal Court Had Granted Leave To Appeal

[79] As a last-minute attempt to persuade this court to allow the appeal and to remit the matter back to the High Court for trial, learned counsel for the appellant tried to prevail upon this court to answer a question not posed for the leave application to the Federal Court when it was made under s. 96 of the Courts of Judicature Act 1964.

[80] It was with respect to the correct interpretation of cl. 13.1.2 that reads:

> 13.1.2 In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1, the Developer shall pay to the Purchaser liquidated damages to be **calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer** and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser. (emphasis added)

[81] It was argued that "such part of the purchase price that has been paid by the purchaser to the developer" would be different from the full purchase price. That was not the question of law posed for the leave application and as such the Federal Court would not generally venture to answer questions raised for the first time when the appeal is heard with respect to the questions of law that had been allowed to be argued during leave stage when the justice of the case does not demand it as in preventing a miscarriage of justice.

[82] It must be stated that an appeal to the Federal Court from a decision of the Court of Appeal is not by way of a re-hearing as is an appeal from the High Court to the Court of Appeal. See s. 69(1) of the CJA. The strict provision of "Appellate Jurisdiction – Civil Appeals" of the Federal Court in s. 96 of the CJA reads as follows:

> Conditions of Appeal
>
> 96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court –
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[83] Rule 47(4) of the Rules of the Federal Court 1995 further followed up by reiterating the same restrictions as follows:

(4) The hearing of the appeal shall be confined to matters, issues or questions in respect of which leave to appeal has been granted.

[84] It is axiomatic that the ambit and scope of an appeal to the Federal Court from that of a Court of Appeal must be necessarily confined to the questions of law for which leave was granted for such an appeal is not as of right and neither is it by way of a re-hearing. We would therefore hearken to the cautionary constraint issued by the Federal Court in *Spind Malaysia Sdn Bhd v. Justrade Marketing Sdn Bhd & Anor* [2018] 4 CLJ 705 as follows:

[30] *The appeal should be confined only to the questions as determined by this court in granting leave to appeal, and other grounds which are necessary to decide on those questions.* As this court has held in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998) 3 CLJ 503; [1998] 3 MLJ 151 at pp. 536-537 (CLJ); p. 173 (MLJ):

> Under r. 108(1)(c) of the Rules of the Federal Court 1995, the Federal Court may determine or frame the questions or issue which ought to be heard in the appeal; in my view, this discretionary power given statutorily must be given effect to. In other words, *only the issues or questions thus framed would be heard or entertained.*
>
> The approach I would adopt when it is disputed whether any stated ground in the said memorandum of appeal is outside or not the scope of issues that the Federal Court framed in granting leave is whether such ground is, *prima facie*, necessary to enable the court to decide the said issue with precision. If it is not, the ground is thus outside the scope.

[31] *The parties should confine their submissions to the questions of law posed, and are not entitled to seek a complete rehearing to review the concurrent findings of fact made by the courts below.*

> In *Ho Tack Sien & Ors v. Rotta Research Laboratorium SpA & Anor; Registrar of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 166 at [22], this court held that:
>
> > The submissions advanced by learned counsel for the defendants in support of those issues are in effect seeking a reversal of the findings of facts in this case on the infringement of the trademark by the defendants with the resultant consequential orders. *In our view this would result in a complete re-hearing of the appeal on those issues and would be a complete disregard to the provision of s. 96(a) of the Courts of*

> *Judicature Act 1964 when leave to appeal to this court was granted. The two questions posed before this court when leave was granted have been couched to incorporate a point of law which if answered in the affirmative or negative has the effect of reversing the conclusions made by the Court of Appeal without any further evaluation of the evidence. It is the answers to those questions which must have the effect of reversing the conclusions made by the Court of Appeal and not the result of a review of the concurrent findings of facts made earlier on. The questions posed must also relate to a matter in respect of which a determination has been made by the Court of Appeal* (see the case of *Meidi-Ya Co Ltd, Japan & Anor v. Meidi (M) Sdn Bhd* [2009] 2 MLJ 14). We therefore rule that the defendants should only be allowed to confine their arguments on the two questions of law posed before this court.
>
> (emphasis added)

[85] There is still another impediment to allowing a new question of law to be ventilated at this late stage as both the High Court and the Court of Appeal had arrived at a concurrent finding that the summary judgment containing the judgment sum as prayed for was rightly entered against the appellant. The appellant cannot be arguing an objection to a summary judgment application in stages, searching for a new triable issue or stumbling across it as it exhausts the last rung of appeal. It cannot be improving its case through the tiers of appeal and supplementing what was lacking in the High Court and not argued in the Court of Appeal and as such no finding by the Court of Appeal.

[86] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, Abdul Malek Ahmad FCJ observed, at p. 364:

> In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405. Therefore, in the final analysis, the fact remains that it was the appellants who were in breach of the agreements. In the premises, the appeal by the appellants should, in our humble view, be dismissed with costs.

[87] See also the recent decision of the Federal Court in *Teoh Kiang Hong v. Theow Say Kow & Other Appeals* [2025] 2 CLJ 683 at [18]. The Federal Court is not entitled to interfere merely because it would have reached a different conclusion had it been hearing the case at first instance. See: *The News Straits Times Press (Malaysia) Bhd v. Aideah Communication Sdn Bhd* [2025] 5 CLJ 661, at [34].

[88] We are not unaware that r. 57(2) of the Rules of the Federal Court 1995 does confer some discretion on the Federal Court as the apex court in preventing a miscarriage of justice when it provided a slitter of opening as follows:

> (2) The appellant shall not at the hearing without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[89] In *YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 at 325A-I, the Federal Court held that it has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice.

[90] A more recent Federal Court in *Melawangi Sdn Bhd v. Tiow Weng Theong* [2020] 4 CLJ 1; [2020] 3 MLJ 677 also echoed the same sentiments and confining it to only very limiting circumstances in order to achieve the ends of justice as follows:

> [34] In resisting the submissions, learned counsel for the defendant made this point. He pointed out that none of the questions for which leave was granted relate to or deal with this issue. As such, this issue should not be raised in the present appeal.
>
> [35] We have given our utmost considerations of the submissions of learned counsel for the defendant. In the circumstances of the present case, we do not agree. Like all general rules there are exceptions. As we have said in the recent case of *Noor Azman bin Azemi v Zaheda bt Mohamed Rafik* [2019] 3 MLJ 141; [2019] 3 CLJ 295 as a matter of broad general principle, a party is not precluded from raising a new issue in an appeal because this court has the power and therefore the discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471 and *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145). We must add here that *the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned.* (emphasis added)

[91] We are not satisfied that in this case we should exercise our discretion to allow a fresh question of law to be answered when it was not argued in the High Court nor the Court of Appeal. The ends of justice does not demand it. In any event, we find no merits in the said argument of the appellant. That clause must of course be read in the context of cl. 13.1.3 as stipulates as follows:

> 13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

[92] The purchasers can only make a claim for LD for late delivery after they had taken vacant possession which would be after they had paid the full purchase price. The appellant as developer should not be allowed to take advantage of its own breach in failing to deliver vacant possession on time and then limiting the calculation of the LD based on the amount of purchase price paid at the date of contractual delivery of vacant possession when the purchasers were able and willing to pay the full purchase price as seen from the undisputed fact that they had done so upon taking vacant possession.

[93] To peg the calculation of the LD based on the amount of purchase price paid at the point of entering into the late delivery period would be to reward the developer for the delay as what the purchasers are deprived of is vacant possession of their completed unit which is represented by the full purchase price and not uncompleted unit representing the amount of purchase price paid up to that stage of completion.

[94] To accede to the developer's argument would be to allow the developer to profit from its own breach to the detriment of the purchasers who would have to continue servicing the interests on their loans and at the same time being deprived of use of the completed unit or derive rental income from the completed unit. It would be to subject purchasers to a double whammy and as such unconscionable in all the circumstances of the case.

Decision

[95] We find that at the end of the day the questions of law posed are case-specific and case-sensitive in that the interpretation of the relevant clauses would be dependent on the way they are drafted as interpreted against the context of the whole SPA. Little value would be served by giving direct answers to the questions of law posed as each case would be different from the others in bespoke SPAs drafted by developers as they do not fall in the case of offices within the statutory prescribed standard form SPAs under Schedule G or H of the HDR.

[96] We therefore see no necessity of answering the questions of law posed save to allude to the general principles and approved approaches to interpreting contractual terms.

[97] We had therefore dismissed the appeal with costs and affirmed the decision of the Court of Appeal below. Considering the number of purchasers involved we ordered costs of RM80,000 to the respondents subject to allocator.